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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* STEVEN A. ROYE

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Appeal 2009-014566  
Application 10/690,674  
Technology Center 2400

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*Before* JEAN R. HOMERE, JOHN A. JEFFERY, and  
ANDREW J. DILLON, *Administrative Patent Judges*.

DILLON, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-26. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

#### STATEMENT OF THE CASE

Appellant's invention is a method and apparatus for recording, measuring and calculating the percentage of positive audience response generated by any entertainment or presentation source involving an audience. *See* Abstract.

Claim 1 is illustrative with key disputed limitations emphasized:

1. A method comprising:

*recording a first length of time of a first positive audience response of one or more test subjects to a presentation; and*

*displaying a first numerical value for the first length of time on a computer monitor; and*

*displaying a first alphanumeric heading on the computer monitor which indicates what the first numerical value refers to.*

The Examiner relies on the following as evidence of unpatentability:

Kondo	US 2004/0117815 A1	June 17, 2004 (filed June 24, 2003)
Leroy	US 5,812,642	Sep. 22, 1998
Eldering	US 6,457,010 B1	Sep. 24, 2002

#### THE REJECTIONS

1. The Examiner rejected claims 1-4, 7-11, 15, 18, 20-22, and 26 under 35 U.S.C. § 103(a) as unpatentable over Kondo and Leroy. Ans. 3-11.<sup>1</sup>
2. The Examiner rejected claims 5, 6, 12-14, 16, 17, 19, and 23-25 under 35 U.S.C. § 103(a) as unpatentable over Kondo, Leroy and Eldering. Ans. 11-17.

#### CONTENTIONS

Regarding representative claim 1, the Examiner finds that Kondo discloses a method for recording a first length of time of a first positive audience response (characteristic amount 304 of Fig. 25C is voice data recorded from an audience. When the characteristic amount exceeds the level of threshold La3 a determination of laughing is estimated, as disclosed in Paragraph [0124]). The Examiner notes that Kondo discloses that Output Unit 50 displays the audience response data in a graphical format, but that it is unclear if a first numerical value for the first length of time and a first alphanumeric heading identifying the first numerical value are displayed on the computer monitor. The Examiner cites Leroy, in a similar field of invention for disclosing the real-time display of audience telephone call activity regarding a promotional presentation. Ans. 3-4.

Appellant argues that Kondo does not disclose displaying a first alphanumeric heading on the computer monitor which indicates what the first numerical value indicates, nor does Kondo demonstrate labeling along the time axis of the depicted graphs to provide an indication of the duration

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<sup>1</sup> Throughout this opinion, we refer to the Appeal Brief filed February 10, 2009 and the Examiner's Answer mailed May 19, 2009.

of a particular audience state, or the length of time that an audience state should be saved or displayed. Appellant also argues that Leroy merely displays information regarding phone calls or monetary pledges and not positive audience response. Br. 9-12.

The issues before us, then, are as follows:

### ISSUES

1. Under § 103, has the Examiner erred in rejecting claims 1-4, 7-11, 15, 18, 20-22, and 26 by finding that Kondo and Leroy collectively would have taught or suggested (1) recording a first length of time of a first positive audience response of one or more test subjects to a presentation; (2) displaying a first numerical value for the first length of time on a computer monitor; and (3) displaying a first alphanumeric heading on the computer monitor which indicates what the first numerical value refers to?

2. Under § 103, has the Examiner erred in rejecting claims 5, 6, 12-14, 16, 17, 19, and 23-25 by finding that Kondo, Leroy, and Eldering collectively would have taught or suggested the claimed invention?

### FINDINGS OF FACT

We find that the following enumerated findings of fact (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Kondo discloses an audience state estimation system which outputs an estimated result of an audience state. *See Kondo, Abstract.*
2. Figure 24A of Kondo is depicted below:

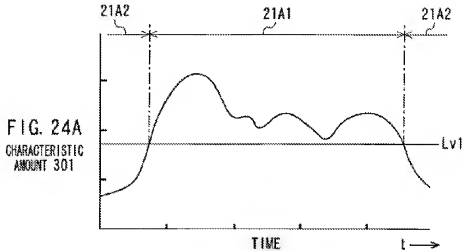


Figure 24A is a graph depicting an estimated result based upon the characteristic amount. As illustrated, when characteristic amount **301** is larger than reference level Lv1, a state of “beating time with hands” and of “clapping” is estimated. The horizontal axis is elapsed time. Kondo, Fig. 24A and ¶[0120].

3. Leroy discloses a system and method for monitoring and analyzing audience response to a broadcast promotion. *See Leroy Abstract.*
4. Figure 7 of Leroy is depicted below:

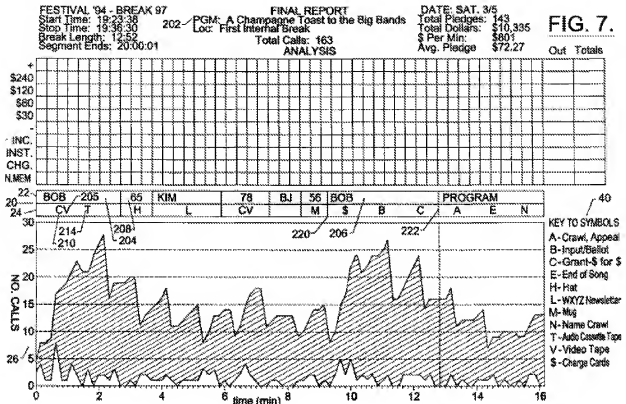


Figure 7 is a graphic presentation of pledge breaks analyzing audience response using several parameters plotted against time. Leroy, col. 6, ll. 63-65.

- Eldering discloses a subscriber characterization system which monitors records of time duration that programming is watched, the volume at which the program is watched, and the category and sub-category of the programming. *See* Eldering Abstract.

## ANALYSIS

Appellant argues that claims 1-3 and 7-11 should not have been rejected over Kondo and Leroy since Kondo “does not disclose displaying a

first numerical value for a first length of time on a computer monitor for a first positive audience response” and does not disclose “displaying a first alphanumeric heading on the computer monitor which indicates what the first numerical value refers to.” Appellant notes that Kondo discloses a time axis, but argues that there are no labels depicted along that axis permitting the duration of an audience response to be determined. Br. 9.

Appellant also argues that the display within Leroy regarding phone calls does not indicate a positive audience response to the program. Br. 11.

The Examiner finds that Kondo discloses graphic representations of the state of an audience that are depicted along a time axis, and that despite the absence of express labels, such representations demonstrate “recording a first length of time of a positive audience response.” Ans. 21. The Examiner also cites Leroy for an express indication of elapsed time of positive audience responses.

We find that Kondo teaches presenting a graphic indication of positive audience response with an indication of the duration of that response. We find that recording the duration of such response is within the inherent teaching of Kondo. (FF-1,2).

Consequently, we are therefore not persuaded that the Examiner erred in rejecting claims 1-3 and 7-11 under § 103.

Appellant argues that claim 4 was improperly rejected over Kondo and Leroy in view of the fact that Kondo fails to disclose tracking the total presentation time, and Leroy only tracks telephone calls and pledges, which Appellant argues are not synonymous with positive audience response. Br. 12-13.



The Examiner argues that Leroy clearly depicts the recordation of the total presentation time and notes that Kondo is cited for the feature of identifying positive audience response. Ans. 25.

We find that Leroy expressly states that it is directed to a system for monitoring and analyzing audience response (FF3) and that Leroy discloses tracking the total presentation time, as depicted in Figure 7. (FF4).

We therefore find that the Examiner did not err in his rejection of claim 4 under § 103 over Kondo and Leroy.

Appellant argues that claims 9 and 10 should not have been rejected over Kondo and Leroy in view of a perceived failure of the references to depict recording positive audience responses during specific time intervals. Br. 13-14.

The Examiner finds that the horizontal time axis of Kondo coupled with the graphic display of Leroy suggest these claim features. Ans. 19-21. We agree with the Examiner's finding and conclude that the Examiner did not err in rejecting claims 9 and 10 over these references.

Appellant argues that claim 11 was improperly rejected in view of the failure of the cited references to disclose the determining and display of an average amount of positive audience response during a presentation. Br. 14-15.

As noted above, with respect to claim 4, the Examiner finds that Leroy depicts the display of positive audience response over the entire duration of a presentation. Ans. 24-25. We concur with the Examiner and find that the Examiner did not err in rejecting claim 11.

Appellant argues that claim 15 should not have been rejected over Kondo and Leroy, alleging that the Kondo reference, although depicting a

horizontal time axis, fails to expressly label that axis with specific numbers. Appellant further argues that Leroy does not disclose recording a length of time during which a positive audience response is demonstrated. Br. 15-17.

As noted above with respect to claim 1, the Examiner finds that Kondo indeed discloses the display of the length of time during which a positive audience response is noted. Ans. 30.

We find the Examiner's position persuasive and hold that the Examiner did not err in rejecting claim 15, and claims 16-19 and 26, which depend therefrom, which were not separately argued.

Appellant also argues that claims 20-22 were improperly rejected in view of the failure of the cited references to display specific times for positive audience responses. Br. 17-18.

For the reasons set forth above, we find the Examiner did not err in rejecting claims 20-22.

Appellant argues that claim 5 was improperly rejected over Kondo, Leroy and Eldering, urging that the references fail to show or suggest determining a ratio of the time of positive audience response to the total presentation length and displaying that ratio. Br. 18-19.

The Examiner finds that Eldering discloses various probabilistic techniques for profiling a user's viewing habits. Ans. 13. We find that the cited references disclose the determination of the duration of positive audience response, the duration of a presentation, and various techniques for analyzing that data (FF5), and we find that a ratio determination is inherent within such teaching. We therefore find that the Examiner did not err in rejecting claim 5, and claim 6, which depends therefrom, and which is not argued separately.

Similarly, Appellant argues that claims 12 and 13 were improperly rejected, in view of the failure of the cited references to disclose determining and displaying the total positive audience responses during specific time intervals.

For the reasons set forth above with respect to claims 9 and 10, we find that the Examiner did not err in rejecting claims 12 and 13.

Appellant argues that claim 14 should not have been rejected in view of the failure of the cited references to disclose the average number of positive audience responses per minute of presentation.

For the reasons set forth above with respect to claim 11, we find the Examiner did not err in rejecting claim 14.

The Appellant argues that the Examiner improperly rejected claims 16, 17, and 19 in view of the failure of the cited references to disclose the display of a ratio of positive audience response time to total presentation time.

For the reasons set forth above with respect to claim 5, we find the Examiner did not err in rejecting claim 16, and claims 17 and 19 which depend therefrom and which are not separately argued.

Finally, Appellant argues that claims 23 and 24 should not have been rejected in view of the failure of the references to disclose the determination and display of numerical values for positive audience responses during a first and second minute of a presentation.

For the reasons set forth above with respect to claims 9 and 10, we find the Examiner did not err in rejecting claims 23 and 24.

CONCLUSION

The Examiner did not err in rejecting claims 1-26 under § 103.

ORDER

The Examiner's decision rejecting claims 1-26 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Vsh